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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In Re:
Katz Interactive Call Processing Patent
Litigation

This document relates to:

ALL "B" TRACK ACTIONS
(except CV 07-02254 RGK (FFMx))

Case Nos. CV 07-2096 RGK (FFMx), CV
07-2099 RGK (FFMx), CV 07-2101 RGK
(FFMx), CV 07-2134 RGK (FFMx), CV
07-2192 RGK (FFMx), CV 07-2196 RGK
(FEMx), CV-07-2213 RGK (FFMx), CV
07-2220 RGK (FFMx), CV 07-2250 RGK
(FFMx), CV 07-2257 RGK (FFMx), CV
07-2299 RGK (FFMx), CV 07-2322 RGK
(FFMx), CV 07-2325 RGK (FFMx), CV
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07-2360 RGK (FFMx), CV 07-3002 RGK
(FFMx)

Case No. CV 2:07-ml-01816-B-RGK
(FFMx)

**DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT OF INVALIDITY OF
RAKTL'S SELECTED CLAIMS
UNDER SECTION 112**

Date: To Be Determined
Time: To Be Determined

Judge: Hon. R. Gary Klausner
Ctrm: Courtroom 850

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STATUTES

35 U.S.C. § 112	1, 2, 15
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1 **I. INTRODUCTION**

2 Defendants' opening brief, including Dr. Forys' declaration analyzing the patents
3 as viewed by the person of ordinary skill in the art, pointed to clear and convincing
4 evidence that the claims are invalid under § 112. RAKTL has not pointed to specific
5 facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477
6 U.S. 317, 324 (1986). RAKTL's disputes about claim construction and indefiniteness
7 (both issues of law) do not do so, nor does Dr. Brody's declaration. *See Arthur A.*
8 *Collins, Inc. v. Northern Telecom Ltd.*, 216 F.3d 1042, 1046 (Fed. Cir. 2000) (expert
9 conclusions unsupported by facts); *see also, Novartis Corp. v. Ben Venue Laboratories,*
10 *Inc.*, 271 F.3d 1043, 1051 (Fed. Cir. 2001) ("If all expert opinions ... were accepted
11 without inquiry into their factual basis, summary judgment would disappear from patent
12 litigation."). Defendants are entitled to summary judgment as a matter of law.

13 **II. WRITTEN DESCRIPTION**

14 RAKTL does not dispute that the claim limitations at issue were not included in
15 the originally filed applications or point to explicit written descriptions in the relevant
16 patent specifications for these limitations. Although the claims need not be described *in*
17 *haec verba*, the specifications must include all limitations in the claims, or it must be
18 shown that any absent text is *necessarily* comprehended in the description. *Hyatt v.*
19 *Boone*, 146 F.3d 1348, 1354-55 (Fed. Cir. 1998). That a limitation may be obvious
20 from the disclosure is not enough. *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d
21 1299, 1306-07 (Fed. Cir. 2008). In fact, Dr. Brody's citation to multiple, lengthy
22 passages of the specifications to support his conclusory opinions demonstrates that one
23 skilled in the art would *not* immediately discern the claim limitations at issue as
24 required by *Purdue Pharma L.P. v. Faulding, Inc.*, 230 F.3d 1320, 1323-24 (Fed. Cir.
25 2000). Summary judgment should be granted.

26 **A. Plurality Of Formats (RAKTL Br. 5-7).** RAKTL's argument that the
27 Court's construction of "format" changes the invalidity result in *Verizon* erroneously
28 assumes that the Court re-construed that term. In fact, the Court completely adopted its

1 construction of “format” from *Verizon*, including the “clarifying statements” made in
2 deciding summary judgment motions. Order re: Claim Construction at 12, 16. As the
3 PTO recently confirmed in a reexamination, the specification only describes a single
4 format (no matter how construed), not a plurality of formats as claimed. SUF 1.2.14.

5 RAKTL’s multiple call flow argument is contradicted by Mr. Katz’s declaration
6 submitted in opposition to defendants’ prior art summary judgment motion. He stated
7 that a “Singapore Fling” campaign embodied all the elements of ‘223:5, which claims a
8 single format. He described the “Singapore Fling” campaign, however, as having the
9 same kind of call mode paths into common processing as described in the Dual Call
10 Mode patents. Miller Ex. 98 (Katz Decl.); Forsys 2d Decl. ¶¶ 3-7. RAKTL cannot have
11 it both ways, arguing that such a configuration is a single format for purposes of its prior
12 art positions but is multiple formats for purposes of its § 112 positions.

13 RAKTL points to multiple call modes and ARUs for written description, the same
14 positions rejected in *Verizon* as being “based on the erroneous premise that the different
15 preliminary operations associated with the various call modes define different formats”
16 and as ignoring that those operations “are different aspects of a single format.” *Verizon*
17 SJO at 82. RAKTL does not explain why the specification’s description of Figure 2 as
18 depicting *an* operating format can be ignored. The passage cited by RAKTL stating that
19 “the system implements three calling modes to facilitate various formats” does not
20 describe a plurality of formats; it merely describes that the system is “suitable for use in
21 connection with *one* of ‘various formats.’” *Id.* at 83. RAKTL does not point to any
22 explicit description of a plurality of formats and cannot ignore Dr. Lucantoni’s
23 admission that other interpretations of these passages are possible. SUF 1.2.16.

24 **B. Unqualified Or Unverified Toll Free Calls (RAKTL Br. 7-9).** Contrary to
25 RAKTL’s assertion, defendants do not construe the claims to *require* unqualified toll
26 free calls, but instead to *encompass* systems and processes in which some toll free calls
27 are not qualified, as well as systems and processes in which all toll free calls are
28 qualified. To satisfy § 112, the specification must provide a written description of the

1 full scope of the claim. *See Tronzo v. Biomet, Inc.*, 156 F.3d 1154 (Fed. Cir. 1998)
2 (claims to generic “cup” not supported by description of cups with specific shapes).
3 The specification repeatedly describes the need for regulating calls in the toll free call
4 mode. SUF 1.2.29. RAKTL’s reliance on an isolated statement that it is important to
5 regulate the toll free call mode “in most applications” is improperly taken out of
6 context, just as RAKTL did in *Verizon*. *Verizon* SJO at 86. Further, RAKTL cannot
7 walk away from Dr. Lucantoni’s prior admissions that the descriptions they rely on do
8 not necessarily disclose unqualified toll free calls. *See* SUF 1.2.31-1.2.32. The result
9 here should be the same as in *Verizon*—the claims are invalid.

10 **C. DNIS To Identify A Format (RAKTL Br. 7).** RAKTL’s argument hinges on
11 its incorrect position that the specification describes multiple formats, rather than
12 multiple call modes. The specification’s description of using DNIS to route (or
13 distribute) calls in different call modes to different ARUs or locations is not a
14 description of using DNIS to identify a format as held in *Verizon*, as admitted by Drs.
15 Lucantoni and Brody, and as argued in the PTO to distinguish the Riskin reference.
16 *Verizon* SJO at 85; Miller Ex. 33 (Lucantoni Responsive Rpt. ¶ 39); D.I. 2027-3 ¶ 69;
17 Miller Ex. 97 (Appl. No. 07/555,111, Preliminary Amendment dated July 17, 1990 at
18 8); SUF 1.2.43. RAKTL’s citations stating that DNIS is “useful” do not demonstrate
19 description for the particular use recited in the claims, i.e., to identify a format.

20 **D. “Automatically” Provided (RAKTL Br. 23-25).** Contrary to RAKTL’s
21 assertion, defendants do not construe “automatically provided” to mean out-of-band
22 signaling, but rather that DNIS and ANI are provided by the communication facility
23 “without any external influence or control.” Out-of-band signaling is just an example of
24 “automatically provided.” *See* SUF 1.2.72 (“those DNIS digits might come to you in
25 many ways”). Thus, defendants’ claim construction is not inconsistent with *AT&T*.¹

26 _____
27 ¹ *AT&T* only considered the issue of whether the limitation “means to provide signals
28 representative of data developed by said remote terminals ...” is limited to in-band
because it is a means-plus-function limitation. *Katz v. AT&T Corp.*, 63 F. Supp. 2d 583,
620-21 (E. D. Pa. 1999). *AT&T* never considered the construction of “automatically.”

1 The fundamental flaw in RAKTL's claim construction—that the communication
2 facility provides DNIS (or ANI) without human intervention—is that it interprets
3 “provided” (recited in other claims) and “automatically provided” as meaning exactly
4 the same thing, contrary to the established principle that “there is presumed to be a
5 difference in meaning and scope” when different words are used. *Tandon Corp. v. U.S.*
6 *Int'l Trade Comm'n*, 831 F.2d 1017, 1023 (Fed. Cir. 1987); see *Pause Tech. LLC v.*
7 *TiVo Inc.*, 419 F.3d 1326, 1334 (Fed. Cir. 2005) (rejecting a construction as it “attaches
8 no significance to the word ‘predetermine.’”). RAKTL and Dr. Brody agree that DNIS
9 and ANI have *always* been provided by the communication facility without human
10 intervention. If “automatically” meant without human intervention, there would be no
11 reason to say “automatically” at all, i.e., it would be meaningless, a point RAKTL has
12 not disputed. RAKTL could have simply recited “provided by the communication
13 facility” as it did in other claims, but that is not what RAKTL did.

14 Contrary to their position in *Citibank*, RAKTL and Dr. Brody posit that
15 “provided” and “automatically provided” are distinguished because the former involves
16 the caller keying in the number on his telephone, whereas the latter involves DNIS and
17 ANI being provided by the communication facility without the caller keying in the
18 number. Brody Decl. ¶¶ 510-11. This argument ignores that “provided” and
19 “automatically provided” as used in the claims both define how the communication
20 facility provides DNIS and ANI. It has nothing to do with any action by the caller. Dr.
21 Brody's suggestion (*id.* ¶ 528) that DNIS does not involve the caller is incorrect,
22 because the called number is *always* keyed in by the caller before DNIS is provided or
23 automatically provided by the communication facility. Forsys 2d Decl. ¶¶ 8, 9. With
24 this supposed distinction between “provided” and “automatically provided” debunked,
25 RAKTL's construction improperly renders “automatically” superfluous. Also, Dr.
26 Brody's argument (Decl. ¶ 549) that “automatic number identification (ANI)
27 automatically provided” is analogous to the way people use the phrase “ATM machine”
28 has no place in claim construction, because claims must be carefully drafted to define

1 the legal scope of patent protection. *See Sage Prods., Inc. v. Devon Indus., Inc.*, 126
2 F.3d 1420, 1425 (Fed. Cir. 1997). Defendants' construction is consistent with the claim
3 language and amendment of the claims during prosecution to add "automatically" (how
4 many claims were amended is irrelevant). The specifications simply do not provide any
5 guidance as to the meaning of "automatically provided."

6 RAKTL contends that defendants' construction improperly excludes the disclosed
7 embodiments. However, the patents include many claims that do not recite DNIS or
8 ANI "automatically provided." Those claims cover how DNIS and ANI are provided in
9 the disclosed embodiments (i.e., non-automatically), but RAKTL chose to assert the
10 flawed "automatically provided" claims at issue here. *See PSN Illinois, LLC v. Ivoclar*
11 *Vivadent, Inc.*, ___ F.3d ___, 2008 WL 1946550 at *5 (Fed. Cir. May 6, 2008) ("disclosed
12 embodiments may be within the scope of other allowed but unasserted claims").
13 RAKTL points to no description of "automatically provided" as properly construed, and
14 there is none. The patents only describe the communication facility providing DNIS
15 and ANI, not "automatically" providing DNIS and ANI. SUF 1.2.81-1.2.92.

16 **E. Operators Entering Data (RAKTL Br. 10-12, 18-19).** Unlike the '965
17 patent, the Format Qualification and Conditional Interface patents do not include an
18 explicit description of operators entering data. RAKTL only argues implicit description,
19 but the passages RAKTL points to discussing data entry by the automated system, "data
20 accumulation," "manual operation," "prompting the operator," and receiving caller data
21 do not suggest, much less *necessarily* describe, operators entering data as required by
22 *Hyatt*. Forys 2d Decl. ¶¶ 15-26. Mr. Katz and Dr. Brody have admitted (in discussing
23 the Format Qualification patents) that caller data taken by an operator may simply be
24 written down for later entry by another employee. SUF 1.2.119. Contrary to RAKTL's
25 assertion, *Verizon* did not address whether the Format Qualification patents provide
26 written description for operators entering data. *See Verizon*, 326 F. Supp. 2d 1094-95.

27 **F. Voice Operating Instructions To "Specific Ones" Of The Individual**
28 **Callers (RAKTL Br. 13-14).** This boils down to a claim construction dispute, which

1 does not prevent summary judgment. Defendants do not construe “specific ones” to be
2 *only* fewer than all individual callers. Rather, the claim *encompasses* a group of callers
3 that is all or fewer than all. RAKTL’s construction improperly reads the “specific ones”
4 language out of the claim and is inconsistent with RAKTL’s proposed construction of
5 this term in *AT&T*, “individual callers chosen from a group.” COL 2.2.71.

6 The Format Qualification patents only describe all, not some, callers getting voice
7 operating instructions and therefore do not describe the full scope of the claim as
8 required by *Tronzo* (claims to generic “cup” not supported by description of cups with
9 specific shapes). Dr. Brody’s reliance (Decl. ¶¶ 237-42) on passages discussing the
10 polling and mail order formats is misplaced, because they do not involve the key or
11 participation numbers recited in the claims. Also, the cited mail order passage actually
12 supports defendants’ position, because it states that “the caller might be advised” (i.e.,
13 given an instruction) to press “*” to speak to an operator. Forsys 2d Decl. ¶¶ 27-31.

14 **G. DNIS To Control Processing Of Formats (RAKTL Br. 14, 19-20).**

15 RAKTL’s proposal that “controlling” means identifying or selecting is wrong as a
16 matter of law, because ‘135:1 and 9 separately recite identifying a format and
17 controlling processing. COL 2.2.73. Dr. Brody’s construction of “control” in his prior
18 art declaration is also contrary. D.I. 2027-3 ¶ 189. RAKTL points to no written
19 description in the Format Qualification or Lottery patents for this limitation as properly
20 construed (directing the operations of the format after it has been selected). RAKTL
21 argues for a claim construction that covers the preferred embodiment, but it is improper
22 to redraft the claims to preserve their validity in that circumstance. *See Lucent Tech.,*
23 *Inc. v. Gateway, Inc.*, __ F.3d __, 2008 WL 1970225 at *13 (Fed. Cir. May 8, 2008).

24 **H. Generic “Ticket,” “Card,” “Format,” And “Control System” (RAKTL**
25 **Br. 20-21).** RAKTL argued for and obtained a broad construction of “ticket.” The
26 Court determined that there were no words in the claim limiting it to a lottery ticket
27 (Order re: Claim Construction at 49-51), but did not reach the written description issue.
28 Having obtained a broad construction, RAKTL now has the problem that the

specification does not provide a description for the claims as broadly construed. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 911-12 (Fed Cir. 2007).

The entire specification, including the *summary of the invention*, describes the invention in its most general sense as relating to lotteries: “In general, the present invention comprises a telephonic-interface lottery system” that uses a “scratch-off lottery ticket.” SUF 1.2.159. *In Re Lew*, 2007 WL 4201279 at *3 (Fed. Cir. 2007) (description of “the invention” is strong evidence limiting the invention). The patents lack written description beyond lotteries. Forsys 2d Decl. ¶ 32.

I. Unique Identification Number Indicating A Predetermined Limit On Use (RAKTL Br. 20). RAKTL only disputes defendants’ claim construction, which does not prevent entry of summary judgment. RAKTL’s construction improperly inserts “*use of*” in front of the actual claim language “said unique identification number ... providing an indication that said unique identification number has reached a predetermined limit on use” to get the result it wants. Without those improper extra words, RAKTL points to no evidence of written description for this claim limitation.

J. Testing “In Relation To Said Call Data Signals” (RAKTL Br. 19). RAKTL argues that the call data signals can be “ANI *and/or* DNIS signals,” but that is not what ‘150:10 and 11 recite. The preamble, which provides the antecedent basis, defines the call data signals that are tested “as to indicate called *and* calling numbers.” *Compare* ‘150:1, which is not so limited. RAKTL does not point to written description for testing both called and calling numbers. This is dispositive even under RAKTL’s construction (testing ANI, DNIS, or both), because there is no written description of testing both. *Tronzo*, 156 F.3d 1154 (generic “cup” must be supported).

K. “Format” Generally In The ‘415 Patent (RAKTL Br. 21-22). The entire specification, including the title, abstract, preferred embodiments, and, most importantly, the invention summary, describes *game* formats. SUF 1.2.186-1.2.190. *See In Re Lew*, 2007 WL 4201279 at *3 (description of “the invention” is strong evidence limiting the invention). This consistent disclosure of game formats is not

trumped by typical boilerplate language in the final paragraph before the claims. *Wavestream Corp. v. CAP Wireless, Inc.*, 2006 WL 5104656 at *7 (C.D. Cal. 2006) (boilerplate does not overcome what the inventors expressly say their invention is).

L. “A” File On “Said Individual Callers” (RAKTL Br. 14-15, 22).

Defendants’ construction does not require that “a file” stores data on all callers, but rather that it *encompasses* “a file” that stores data on all callers, which must be supported in the specification. *Tronzo*, 156 F.3d 1154 (generic “cup” claim not supported by description of cups with specific shapes). RAKTL’s reliance on memory 98 in the Format Qualification patents to support storing data on all callers in “a file” is improper, because the claims recite a memory that accesses or updates a file. Files are contained in memory 98; the memory is not a file. *Forys* 2d Decl. ¶¶ 33-39.

RAKTL’s assertion that ‘965:35, 43, and 53 only require that each caller’s data is compared against a file ignores the explicit claim language, “a file on said individual callers,” which encompasses a single file for all callers. RAKTL also ignores that, by contrast, ‘965:31 recites “a file for said individual caller,” demonstrating that RAKTL intended to claim “a file” differently in these claims. Dr. Brody’s cited passages all describe a file for each caller, not a file for all callers. *Id.* ¶¶ 40, 41.

M. Visually Displaying (RAKTL Br. 12). Dr. Brody misconstrues the claims (Decl. ¶¶ 179-82). The displayed “said identification data” in the ‘360:75 connecting step refers to caller identification data, not stored identification data, because the claim recites testing “the *caller identification data* against a file of *stored identification data*.” Also, the plain language of ‘707:201 (“displays data obtained from a data bank accessed by said calling number identification data”) requires that the displayed data be accessed as recited, not just that data from the data bank is displayed. *Forys* 2d Decl. ¶¶ 42, 43.

RAKTL does not point to any explicit description for displaying the specific types of data recited. And the passages RAKTL relies on do not *necessarily* describe these limitations as required by *Hyatt*, because the recited data could be displayed or not. *Id.* ¶¶ 44-46. This is consistent with *Verizon* (which did not address the description issue),

1 which only held that the terminal IT is “capable” of visually displaying the customer
2 number. Finally, the CRT display at terminal CT (which is not an operator terminal)
3 cited by RAKTL does not describe ‘360:13, 14, 18, 36, 86, 106, 114, and 119, because
4 those claims all require display at the operator terminal. *Id.* ¶¶ 47-49.

5 **N. Testing ANI To Qualify Callers For Communication With The System**

6 **(RAKTL Br. 9).** ‘120:71 explicitly recites 800 and 900 called numbers, which means
7 that its independent claim 67 must encompass 800 and 900 called numbers. *See AK*
8 *Steel Corp. v. Sollac*, 344 F.3d 1234, 1242 (Fed. Cir. 2003) (dependent claim presumed
9 to have narrower scope than independent claim). The specification, however, only
10 describes testing ANI signals for qualification in the area code (ACN) call mode.
11 SUF 1.2.232-1.2.234. A passage cited by Dr. Brody (Decl. ¶ 126) concerning limiting
12 access to callers with a phone number ending in certain digits does not describe ANI,
13 because, for example, those digits could be entered manually by the caller. Forsys 2d
14 Decl. ¶ 51. RAKTL’s *Falkner* and *MOBA* cases are inapplicable; defendants argue that
15 the specification (not just the preferred embodiments) does not describe this limitation.
16 Also, RAKTL’s “no disavowal” test is not a proper written description standard.

17 **O. Computer Generated Acknowledgement Numbers (RAKTL Br. 23).**

18 RAKTL agrees with defendants’ claim construction and admits that the ‘965 patent
19 (unlike the Format Qualification patents, *see* SUF 1.2.242-1.2.243) does not explicitly
20 describe acknowledgement numbers that are computer generated. RAKTL points to
21 passages in the ‘965 patent describing acknowledgement numbers being “provided,”
22 “indicated,” and “revealed,” none of which describes those numbers being *generated* by
23 a computer. *Id.*; Forsys 2d Decl. ¶ 52. Also, a passage cited by RAKTL discussing
24 “coded” acknowledgement numbers does not *necessarily* describe that the numbers are
25 computer generated; they could be prepared manually. Forsys 2d Decl. ¶ 53.

26 **P. “Approval Signals” (RAKTL Br. 15-16).** RAKTL construes “approval
27 signals” to mean signals that are provided from one part of the system to another, but
28 that construction is contradicted by the claim language. The last element of many of the

claims (‘707: 69, 85, 86, and 92 and ‘863:1, 2, 5, and 182) recites “processing at least certain of said answer data responsive to said approval signals.” This means that the signals must be provided to the caller; otherwise, the caller could not provide answer data responsive to the approval signals. Forys 2d Decl. ¶ 54. RAKTL admits that there is no explicit description of approval *signals* in the specification. The only passages RAKTL cites do not describe approval signals provided to callers, nor (applying RAKTL’s construction) do they *necessarily* disclose approval signals provided between components of the system. *Id.* ¶¶ 56-58. Also, the claims require that approval signals are provided when the caller’s *participation number* is approved. *Id.* ¶ 55. Yet, Dr. Brody relies on descriptions of approval based on other kinds of numbers, which cannot provide support for this limitation. *Id.* ¶¶ 58, 59.

Q. Central Memory Accessed By A Plurality Of Interface Switching Structures (RAKTL Br. 16-17). RAKTL admits that there is no explicit description of a central memory accessed by the geographically spaced apart interface switching structures. Figure 9 and the related text in the Format Qualification patents RAKTL cites for implicit support do not *necessarily* describe a central memory. Specifically, RAKTL cites “[w]ith data accumulated in the cells, it may be variously down loaded to a central processing station.” However, this describes downloading from cells to a central processing station, which means that the cells (if interpreted as memory) are not located in the CPU 251. SUF 1.2.262; Forys 2d Decl. ¶ 60.

R. Synthesized Voice Signals (RAKTL Br. 9-10). The ‘223:5 preamble recites that callers are “cued by synthesized voice signals ... and respond with digital signals;” the body recites “individually cueing said callers of said select subset to prompt digital signals.” SUF 1.2.266. RAKTL’s argument that the preamble is not antecedent basis focuses on “callers” while improperly ignoring the “cueing” and “respond with digital signals” language found only in the preamble. Considering the full phrase at issue, the preamble provides antecedent basis, and the cues must be by synthesized voice.

RAKTL admits that the specification does not explicitly describe synthesized

1 voice but argues that a “simulated voice question” produced by a voice generator
2 implies synthesized voice. It does not. Simulated voice from a voice generator implies
3 a concatenation of pre-recorded words. Forys 2d Decl. ¶ 61. Even Dr. Brody only
4 opines that a voice generator is *capable of producing*, not that it *necessarily* produces,
5 synthesized voice, which is the standard that must be met. *Hyatt*, 146 F.3d at 1354-55.

6 **S. Key Numbers “In Packaging Of Products” (RAKTL Br. 17).** The
7 specification describes a key number being carried on the product: “For example, a
8 person desiring to participate may purchase *a product which carries a concealed key*
9 *number.*” SUF 1.2.278. The specification does not describe that the concealed key
10 number is included *in packaging* of the product. *Id.* RAKTL only points to the above
11 statement and essentially argues that putting the key number in packaging, rather than
12 on the product as described, would be obvious. Obviousness is not the proper standard.
13 Rather, “it is a question of whether the application necessarily discloses that particular
14 device,” *Hyatt*, 146 F.3d at 1353, a standard that is not met here.

15 **T. Using Identification Data For Cue Suppression (RAKTL Br. 17).** RAKTL
16 only purports to point out implicit description for this limitation, but the passages cited
17 by RAKTL regarding pre-registration do not *necessarily* describe cue suppression,
18 because the same cues can be given in pre-registration and real time registration. For
19 example, a caller entering the system could hear the following initial cue: “If you wish
20 to pre-register, please input your credit card number now; if you have pre-registered,
21 input your caller identification number.” After inputting his credit card number to pre-
22 register, the caller would be qualified and given an identification number that could be
23 used for later participation in the game. If the caller has already pre-registered and
24 inputs an identification number in response to the same initial cue, the system proceeds
25 directly to the game. Thus, the caller always receives the same cue whether pre-
26 registered or not. No cue is suppressed based on identification data. Forys 2d Decl. ¶
27 64; *see generally, id.* ¶¶ 62-66.

1 **III. INDEFINITENESS**

2 Because “[a] determination of claim indefiniteness is a legal conclusion that is
3 drawn from the court’s performance of its duty as the construer of patent claims,”
4 *Personalized Media Communications, LLC v. International Trade Comm’n*, 161 F.3d
5 696, 705 (Fed. Cir. 1998), invalidity for indefiniteness is ripe for summary judgment.

6 **A. Voice Signals To Actuate The Caller’s Terminal Apparatus (RAKTL Br.**
7 **27-28).** RAKTL’s argument that “voice signals” activate the speaker in the caller’s
8 telephone is inconsistent with other limitations in the claims. For example, ‘707:69 and
9 ‘863:182 and 188 recite “providing voice signals *to said individual callers*” in the
10 coupling step and “receiving digital identification data from said individual callers
11 responsive to said voice signals,” both of which require that callers receive the voice
12 signals. Such voice signals cannot merely be signals from the system to activate the
13 caller’s telephone speaker as RAKTL asserts. Forsys 2d Decl. ¶¶ 67, 68. RAKTL does
14 not allege how voice signals given to and responded to by callers can actuate the caller’s
15 telephone. Therefore, the actuating language is indefinite.

16 **B. Acknowledgement Numbers Identifying The Transaction For “The**
17 **System” (RAKTL Br. 28-29).** Contrary to RAKTL’s assertion, neither defendants
18 nor the Court have defined what “the system” means in the “acknowledgement
19 number” limitation of ‘965:31. The words “the system” were included in the
20 construction of “acknowledgement number” without defining what “the system”
21 means. Order re: Claim Construction at 6-8. RAKTL tried to correct the fatal flaw
22 in this claim through a certificate of correction, but the PTO refused, holding that
23 adding the needed antecedent basis for “the system” in the preamble would change
24 the scope of the claim. SUF 1.3.14. RAKTL cannot change the scope of the claim
25 now by reading that missing antecedent basis into the claim.

26 **C. Remote Terminals “May Comprise” A Conventional Telephone (RAKTL**
27 **Br. 29-30).** The *AT&T* court’s construction cited by RAKTL confirms the indefiniteness
28 of “may comprise” because as construed, this term means that the remote terminals

1 could be something that is not described in the claims or specification. COL 2.3.14.

2 **D. “Certain Individual Callers,” “Said Individual Callers,” And “At Least**
3 **Certain Of Said Individual Callers” In ‘965 (RAKTL Br. 30).** RAKTL ignores the
4 difference in claim language among the various recited caller groups in direct violation
5 of the principle that “there is presumed to be a difference in meaning and scope” when
6 different words are used. *Tandon Corp.*, 831 F.2d at 1023; *see Pause Tech. LLC*, 419
7 F.3d at 1334 (rejecting a construction as it “attaches no significance to the word
8 ‘predetermine.’”). When this principle is correctly applied, there is no way to determine
9 what group of callers each of these terms is intended to cover. COL 2.3.17. Further,
10 RAKTL does not explain how “said individual callers” are prompted to provide
11 responsive signals, while only “said certain individual callers” (“certain” connoting a
12 smaller group within the group of “said individual callers”) have remote terminals and
13 are interfaced with the system. COL 2.3.18.

14 **E. Customer Identification Number “Or” Other Data (RAKTL Br. 30).** In
15 view of the correction certificate cited by RAKTL, defendants withdraw this argument.

16 **F. No Structure Linked To “Means To Receive” Function (RAKTL Br. 30-**
17 **31).** RAKTL’s argument that the recited functions do not mean using DNIS to select a
18 format is directly contradicted by Dr. Brody’s prior art declaration (D.I. 2027-3 ¶ 149,
19 ‘360:18) and Dr. Lucantoni, who in *Verizon* agreed that ‘065:1 (which, like ‘065:13 at
20 issue, recites receiving DNIS “to identify said select operating format from a plurality of
21 distinct operating formats”) and ‘863:27 at issue require DNIS format selection. Miller
22 Ex. 99 (Lucantoni Dep. 111-112 (Apr. 2003)).

23 In construing the “means for receiving” limitation in ‘065:1 (in the context of
24 dependent claim 4), *Verizon* found that “the ‘065 patent is unclear as to which
25 component selects formats based on called-number identification signals....”
26 326 F. Supp. 2d at 1100. While ultimately identifying corresponding structure in the
27 context of claim construction, *Verizon* did not consider indefiniteness. Even Mr. Katz
28 could not point to disclosure linking structure to the function of using DNIS to select a

1 format. COL 2.3.27. Because the claims at issue here also require DNIS format
2 selection, there is no structure clearly linked to the recited function. None of the
3 passages RAKTL cites links structure to the function of DNIS format selection. Forys
4 2d Decl. ¶¶ 70-75; COL 2.3.29-2.3.32.

5 **G. “Said Additional Call Data Signals” (RAKTL Br. 31-31).** RAKTL admits
6 that the specification describes ANI being provided from the communication facility,
7 consistent with the understanding in the art. But as RAKTL also admits, ‘285:23
8 requires that ANI is provided from the remote terminals, not the communication facility
9 (antecedent basis for additional call data signals is in claim 22). RAKTL fails to explain
10 this contradiction, and instead effectively ignores the language of claim 22, which is
11 improper as a matter of law. *See Pause Tech. LLC*, 419 F.3d at 1334 (rejecting a
12 construction that “attaches no significance to the word ‘predetermine.’”). This
13 irreconcilable conflict between claims 22 and 23 renders claim 23 indefinite.

14 **H. System Claims Reciting A Method Step (RAKTL Br. 32-33).** The claim
15 held invalid in *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1383-84
16 (Fed. Cir. 2005) recited “a system ... wherein ... the user uses the input means....”
17 Similarly, ‘707:116 and ‘893:1, 2, 4, and 83 recite “a system” “wherein said individual
18 callers [users] provide caller credit card number data” and “wherein said certain of said
19 individual callers [users] digitally enter data.” Like the claim in *IPXL*, these claims are
20 indefinite because they recite a system *and* a method of callers (i.e., users) using the
21 system, not just a capability of the system as RAKTL asserts. The cases RAKTL cites
22 do not involve claims reciting users using the system as do the claims at issue here. For
23 example, in *Microprocessor Enhancement Corp. v. Texas Instruments, Inc.*, 520 F.3d
24 1367 (Fed. Cir. 2008), the claims recited a processor for performing certain functions,
25 not use of the processor.

26 **I./J. Failure To Link Structure Including Algorithm (RAKTL Br. 33-35).**
27 RAKTL admits that a computer performs at least part of the ‘551 and ‘065 function and
28 that no algorithm is disclosed. Although pointing to processors PR1-PRn and

1 processing units 92 and 251 as corresponding structure in claim construction (D.I. 735-2
2 at 1 and 7), RAKTL now argues that “specialized components” (interface 20 and the
3 Centrum 9000) are alternative structures programmed to perform the “means for
4 processing” and “analysis structure” functions but does not identify the programming.
5 Corresponding structure must include an algorithm with the processors RAKTL points
6 to for the processing means and analysis structure. *See Harris Corp. v. Ericsson Inc.*,
7 417 F.3d 1241, 1253 (Fed. Cir. 2005); *Tehrani v. Hamilton Med., Inc.*, 331 F.3d 1355,
8 1361-62 (Fed. Cir. 2003) (an algorithm required for “means for processing” term).

9 Contrary to RAKTL’s assertion, *AT&T* n. 15 did not hold *WMS Gaming* inapplicable to
10 the “means for processing” and “analysis structure,” but only that certain § 112, 6
11 limitations were not limited to software for carrying out the seven disclosed formats.

12 The Federal Circuit has rejected RAKTL’s argument that no algorithm need be
13 disclosed for a claimed processor that is merely processing. *See Aristocrat Tech.*
14 *Australia Pty Ltd. v. International Game Tech.*, 521 F.3d 1328, 1333-366 (Fed. Cir.
15 2008) (“[A]ristocrat is in essence arguing for pure functional claiming as long as the
16 function is performed by a general purpose computer. This court’s cases flatly reject
17 that position.”). And although RAKTL argues that the specification describes certain
18 processing steps, RAKTL has not demonstrated that those steps are “clearly linked” in
19 the specification to the recited function or that those steps constitute the entire algorithm
20 necessary to perform the recited function. *See Medtronic, Inc. v. Advanced*
21 *Cardiovascular Sys., Inc.*, 248 F.3d 1303, 1311 (Fed. Cir. 2001) (must clearly link);
22 *Touchcom, Inc. v. Dresser, Inc.*, 427 F. Supp. 2d 730, 736 (E.D. Tex. 2005) (the
23 specification must clearly link an algorithm that performs the entire recited function).

24 **IV. CONCLUSION**

25 Defendants request summary judgment that the claims are invalid under § 112.

26 Date: May 16, 2008

27 By: /s/ Matthew J. Moore

28 Matthew J. Moore
Liaison Counsel for Defendants